2007

David Roswell v. Utah Labor Commission : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID ROWSELL, Appellant/Petitioner, v. UTAH LABOR COMMISSION, Appellees/Respondents.	Case No. 20070405 CA

REPLY BRIEF OF APPELLANT

On Petition for Review from the Utah Labor Commission, Sherrie Hayashi, Commissioner

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ARGUMENT

The Labor Commission in it's brief has cited to numerous cases which are irrelevant as a different standard of review applied to those cases. With respect to the dismissal of Rowsell's lifetime medical benefits with prejudice, the Commission fails to acknowledge it has no jurisdiction to do so. Finally, with respect to the divestiture of attorney's fees, the Commission has ignored the facts and deliberately declined to apply its own administrative rule pertaining to the manner in which attorney's fees are paid. As

such, the Commission's dismissal of the Red Cliffs case with prejudice and aggregation of cases for the purposes of reducing attorney's fees must be reversed.

I. THE COMMISSION RECOGNIZES CORRECTION OF ERROR IS THE APPROPRIATE STANDARD YET IGNORES THAT STANDARD.

As an initial matter, the appropriate standard of review for all purposes in this appeal is correction of error. Consequently, the Commission's unsupported meanderings on the dismissal of Rowsell's medical care with prejudice must fail. It is also why the Commission's refusal to apply its own administrative rule pertaining to attorneys fees fails. Although the Commission concedes that this is the correct standard of review in regard to the dismissal of the Red Cliffs case with prejudice, it asserts that a more deferential standard of review should apply to the Commission's reduction of Mr. Prisbrey's attorney's fees.

The Commission attempts to frame Rowsell's challenge to the reduction in Mr. Prisbrey's attorney's fees as a matter of statutory interpretation or some generalized claim that the Commission acted arbitrarily and capriciously. It follows this characterization with cases that identify a more deferential standard of review for agency decisions and interpretations in that vein. To be clear, the only issue Rowsell presents is whether the Labor Commission has authority to disregard the Utah Code and its own administrative rule for the purpose of reducing attorney's fees on an ad hoc basis. Rowsell does not

challenge the Labor Commission's fact findings. Neither does he challenge the Commission's interpretation of the attorney's fee statute under its administrative rule beyond requesting that the Commission abide by the plain terms of the statute and its accompanying rule. Nor does Rowsell present a generalized claim that the Commission's reduction of fees was merely arbitrary and capricious. As such, all of the cases cited by the Commission are simply not on point.

Osman's Home Improvement v. Industrial Comm'n, 958 P.2d 240 (Utah App. 1998), cited by the Commission, deals with the standard of review in cases involving mixed questions of fact and law in light of the legislature's grant of discretion to the Commission to determine the facts of the case. At issue in *Osman's Home Improvement* was whether the claimant was an employee or an independent contractor. *Osman's Home Improvement's* appeal was based on the argument that the Commission erred in its findings of fact. This put the appellate inquiry squarely within the terms of 63-46b-16(4)(h)(i) and required the court to review the Labor Commission's findings of fact for arbitrariness based on the intermediate standard of reasonableness. *Id.* Rowsell's appeal, on the other hand, is not based on the Labor Commission's factual findings.

Likewise, in *Steiner Corp. v. Auditing Division*, 979 P.2d 357 (Utah 1999), the plaintiff challenged agency action in that case under Utah Code Ann. §63-46b-16(4)(h)(iv) as arbitrary and capricious. The court therefore was bound to review that case for arbitrariness and caprice.

Similarly, the plaintiff in *R.O.A. Gen., Inc. v. Dept. of Transp.* 966 P.2d 840 (Utah 1998), challenged the reasonableness of an agency's interpretation of a statute it had been given authority to interpret. Both of these cases, by their terms, called for an intermediate standard of review.

Finally, in *Brown & Root Indus. Serv. v. Industrial Comm'n*, 947 P.2d 671 (Utah 1997) the Supreme Court held that an administrative agency's grant of discretion is limited by its own rules. While *Brown & Root* stands for the proposition that the courts review agency interpretation and application of its own rules for "reasonableness and rationality," it has also holds that an agency, once it has properly promulgated rules interpreting a statute, may not ignore those rules. Id at 677 (citing *Willardson v. Industrial Comm'n*, 904 P.2d 671.)

None of the aforementioned cases cited by the Commission have applicability to Rowsell's claim that the Commission failed to abide by the plain terms of the attorney's fee statute and its own rule. Further, the provisions of the Administrative Procedures Act that are relevant to Rowsell's challenge do not call for deferential review of the Commission's action in reducing attorney's fees. Rowsell's challenge is based on Utah Code Ann. § 63-46b-16(4)(b), that the Commission lacked jurisdiction to divest Prisbrey of fees based on the plain language of the statute. In addition, Rowsell challenges the reduction in attorney's fees based on Utah Code Ann. §63-46b-16(4)(h)(ii) and (iii)

because the Commission's actions violate its own rule and are contrary to prior practice of uniformly applying the attorney's fee rule.

The Utah Supreme Court has already established that the Commission does not have authority "interpret" the plain terms of a statute or to decline to abide by its own administrative rule in administering a statute. See, *Martinez v. Media-Paymaster* 164 P.3d 384, 395 (Utah 2007) and *Willardson*, respectively. Further, the Commission's ability to regulate attorneys' fees on an ad hoc basis is a question of law. Therefore, the Commission's deliberate decision not to apply its own rule must be reviewed for correction of error.

II. THE COMMISSION LACKS THE AUTHORITY TO DISMISS ROWSELL'S LIFETIME MEDICAL CARE WITH PREJUDICE.

A. Rowsell's appeal is both timely and pertinent.

Rowsell's appeal of the dismissal with prejudice is neither hypothetical nor unripe. This appeal is the result of a final order entered by the Commissioner affirming the ALJ's dismissal of the Red Cliffs case with prejudice. According to Utah Code Ann. § 34A-2-801, the only proper mechanism for challenging a Labor Commission Order is by appeal. Moreover, Rowsell placed the issue of dismissal with prejudice squarely before the Labor Commission in its Motion for Review of the Red Cliffs case. The fact that the Labor Commissioner chose not to address it does not render it "hypothetical" or "unripe."

Most importantly is that Red Cliffs agreed to pay for surgery to Rowsell's spine. The Labor Commission entered an order dismissing Red Clifs from that obligation. A need for surgical spine surgery is not, as claimed, hypothetical or unripe. It is real and at the heart of the medical issues involved in the litigation before the Commission.

Similarly, the cases cited by the Labor Commission for the proposition that Rowsell's challenge of the dismissal with prejudice of the Red Cliffs case is "hypothetical" and not ripe for decision do not apply to the circumstances of this case. The *Redwood Gym v. Salt Lake City Comm'n*, 624 P.2d 1138 (Utah 1981) case cited by the Commission, involved generalized claims that a city ordinance that required masseurs to only give massages to members of the same sex violated state and federal constitutional provisions. The court there ruled that the allegations were too attenuated to constitute a real controversy and declined to rule on those challenges. Here, in contrast, the Commission's dismissal with prejudice is contrary to law and violates Rowsell's rights under the Workers' Compensation Act to actually obtain the benefits to which the Labor Commission has already agreed he was entitled.

Likewise, in *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595 (Utah App. 1993), the issue was whether a third party beneficiary to an insurance policy could seek a declaratory judgment as to the extent of policy coverage without first establishing the liability of the insured. The Court held that it could not determine coverage under the policy without a context in which to put it and that declaratory judgment still required a

justiciable controversy. This was essentially a fishing expedition where plaintiffs wanted to first find out if there were any deep pockets before pursuing what appeared to be a long and difficult claim against the insureds. Here, there is no question that Rowsell is entitled to workers compensation benefits. However, the Labor Commission's dismissal with prejudice effectively extinguishes Rowsell's rights to medical benefits as agreed by the parties.

Finally, irrespective of the above issues, the Commission simply lacks the authority to dismiss the Red Cliffs case with prejudice pursuant to Utah Code Ann. §34A-2-417(4)(b). The Labor Commission's belief that it could and would still reopen a workers' compensation case that had been dismissed with prejudice is beyond its jurisdictional authority. As such, Rowsell's challenge to the permanent dismissal of the Red Cliffs case is properly before this Court.

B. The Labor Commission's dismissal with prejudice of the Red Cliffs case is contrary to law and must be reversed.

As Rowsell argued in his opening brief, Utah Code Ann. §§ 417 and 420 constitute clear, unambiguous, and mandatory authority with respect to dismissals with prejudice. Section 417 strictly limits the availability of dismissals with prejudice. Likewise, Section 420 charges the Commission with maintaining continuing jurisdiction over workers' compensation cases. Additionally, the continuing jurisdiction statute has been scrutinized

by the Utah courts and in all instances, indicate that dismissals in workers' compensation cases where issues involving entitlement to benefits in the future should be made without prejudice. *See, Vigos v. Moutainland Builders Inc.,* 993 P.2d 207 (Utah 2000) (holding that Labor Commission is required to maintain continuing jurisdiction once a claim for benefits is properly filed with the Commission); and *Bacon v. Industrial Comm'n of Utah,* 854 P.2d 548 (Utah App. 1993) (holding that dismissal with prejudice of workers' compensation case was inappropriate in case where petitioner delayed prosecution of case).

The Commission, however, has never articulated what statutory authority it has to dismiss the Red Cliffs case with prejudice. The Commission states that it "overlooked" Rowsell's arguments concerning the ALJ's dismissal of the Red Cliff's case "with prejudice." (Respondent's Brief at 11.) This is not mere oversight. The bulk of the Red Cliffs Motion for Review involved arguments pertaining to the permanent dismissal. Yet the Labor Commissioner's Order Affirming ALJ's Decision lacks a single reference to this issue, focusing instead entirely on Mr. Prisbrey's attorney's fee. Much of the same can be said for the Labor Commission's response to Rowsell's appellate brief here. Notably, the Commission failed to address any of the statutes cited by Rowsell pertaining to dismissals with prejudice. In fact, the Commission refers to no substantive statute or case in Respondent's Brief pertaining to its dismissal with prejudice of the Red Cliffs case.

Rather, the Commission offers its unsupported position that "the Commission does not subscribe to Rowsell's interpretation of the effect of Judge Marlowe's Order" and offers a reading of the ALJ's final dismissal with prejudice "in context" with the entire Order. (Respondent's Brief at 15.) However, the only thing that a "contextual" reading of the ALJ's Order shows is that it is at best contradictory. The Commission correctly sets forth Rowsell's concerns that the ALJ's overall dismissal of the Red Cliffs case with prejudice will trump the terms of the settlement agreement which were also approved by the ALJ. In an effort to allay Rowsell's concern, the Commission posits that a dismissal with prejudice is not really a dismissal with prejudice. However, the unambiguous language in the Workers' Compensation Act does not permit the Labor Commission's interpretation here on this matter.

The Commission agrees that the appropriate standard of review with regard to the dismissal with prejudice is for correction of error. That standard does not afford deference to an agency's interpretation of statutes that are clear and unambiguous. As the Workers' Compensation Act contains explicit statutory provisions limiting dismissals with prejudice as well as a mandate that the Commission retain jurisdiction over workers' compensation cases, its dismissal with prejudice in this case must be reversed.

III. THE LABOR COMMISSION LACKS THE AUTHORITY TO DISREGARD ITS OWN RULE CONCERNING ATTORNEY'S FEES

In its analysis of facts, the Commission skips from Rowsell's second Application for Hearing accompanied with a request for consolidation straight to the simultaneous submission of settlement agreements. The Commission conveniently fails to address everything that happened between the start and termination of the lawsuits. Further, the Commission glosses over the fact that the ALJ did nothing to actually consolidate the cases. As a practical matter, the ALJ essentially denied Rowsell's request for consolidation and treated them as two cases throughout litigation.

A more accurate version of what happened is found in the Labor Commissioner's "Order Affirming ALJ's Decision," also ignored by the Commission in its brief, where she sums up the background as follows: "Ultimately, Mr. Rowsell entered into separate settlement agreements with Best Western and Red Hills. Judge Marlowe combined the settlement amounts for purposes of computing Mr. Prisbrey's attorney's fee." (Record at 235.) The Commissioner went on to affirm the ALJ's pointed refusal to apply the attorney's fee rule in Mr. Rowsell's cases arguing instead that Mr. Rowsell's "cases" represented a single "claim" and that Prisbrey should only be paid on the one "claim" in the case. However, as discussed at length in Rowsell's opening brief, such a result is not permitted by the attorney's fee statute or Labor Commission Rule.

As discussed above, the appropriate standard of review with respect to the Labor Commission's refusal to apply its attorney's fee rule is correction of error because an agency's refusal to apply its own rule constitutes a question of law. However, the Commission's "interpretation" of the attorney's fee statute and rule merits a response. See Utah Code Ann. § 34A-1-309(1) and Utah Administrative Code R602-2-4.

As the Commission contends, Utah Code Ann. § 34A-1-309(1) gives the Commission authority to "regulate and fix" attorneys' fees. *See, Thatcher v. Industrial Comm'n,* 207 P.2d 178 (Utah 1949). At the same time, the Utah Supreme Court in *Brown & Root* has held that an agency's discretion is limited by its own rules. Thus, the Commission has already fixed and regulated attorney's fees in Rule 602-2-4. For this same reason, the Commission has already lawfully "interpreted" the attorney's fee statute to accomplish its purpose as required by *Utah State Road Comm'n v. Friberg*, 687 P.2d 821 (Utah 1984).

Nonetheless, the Commission in its Brief brandishes the attorney fee statute as if it were a vehicle that is entirely independent from the rule it promulgated under the statute. The Commission argues that it not only has the authority to "regulate and fix" attorneys fees by promulgating rules to that end, but that the statute simultaneously grants the Commission the authority to "regulate and fix" attorneys fees on an ad hoc basis as well. However, this is not the law. Moreover, it has already been established in *Willardson v. Industrial Comm'n* that the Commission must follow its own rules. Contrary to the

assertion of the Commission, Rowsell's challenge does not pertain to the Commission's interpretation of its rule, only whether the Commission is required to apply its rule.

Simply put, the Commission's aggregation of "cases" is not permitted by statute or rule. The Commission's discussion of the singular "case" including the plural "cases" is unsupported by anything other than a secondary source. It is further contradictory to the rules of statutory construction when the language is clear and unambiguous.

Neither should the Commission be allowed to argue that "cases" and "claims" mean the same thing. Such an equation is nothing more than sleight-of-hand to justify its refusal to apply the attorney's fee rule as it was promulgated and as it has heretofore been uniformly applied by the Labor Commission. Paying an attorney's fee per "claim" constitutes a departure from the plain language of both the attorney's fee statute and administrative rule and is nothing more than a veiled attempt to assert authority to regulate and fix attorney's fees on an ad hoc basis.

Moreover, under Section 63-46b-16(h)(iii) of the Utah Administrative Procedures Act, the burden is on the Commission to justify a deviation from the straightforward application of the attorney fee rule. However, the Commission has not provided any justification supporting its refusal to uniformly apply the attorney fee rule other than proverbially beating its chest and declaring that it is the Commission and can administer the statutes under the Workers Compensation Act any way it wants.

Regardless of the statutory requirements on the Commission, it instead asserts that Rowsell has not offered "factual support" for the contention that the Commission's reduction in attorney's fees is contrary to practice. Yet the Commissioner pointedly refused to apply the attorney's fee rule in her Order Affirming ALJ. The Commissioner only suggests that some petitioners' attorneys attempt to manipulate cases so as to bill more than allowed by law or rule without offering support for this statement. Then she characterizes Mr. Rowsell's cases as "difficult" in order to decline application of the attorney's fee rule to Rowsell's cases. (Record at 237.)

Now the Commission, again without factual support, argues that Rowsell presents a "simple" case, and rests on the ALJ's "one claim" interpretation of the statute and rule. In any event, neither characterization of Rowsell's cases constitutes adequate substantive support for the Commission's refusal to apply the attorney's fee rule. Neither does an outright refusal to apply the attorney's fee rule as promulgated by the Commission constitute a permissible "interpretation" of its rule. For the above reasons, the Commission's reduction of attorney's fees in Rowsell's cases must be reversed.

CONCLUSION

For the above-state reasons, Rowsell respectfully submits that the Labor Commission's dismissal of medical benefits with prejudice and the inappropriate aggregation of multiple cases divesting Prisbrey of earned attorney fees be reversed.

DATED this 4 day of December, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of December, 2007, a copy of the foregoing REPLY BRIEF OF APPELLANT was mailed, postage prepaid, as follows:

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